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Supreme Court of the United States

OCTOBER TERM, 1952

No. 528

ANTHONY D. DUKE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on November 3, 1952.

Opinions Below

The memorandum opinion of the Tax Court of the United States (R. 4a, 7) is reported in 10 T. C. M. 1175. The opinion of the United States Court of Appeals for the Second Circuit, dated November 3, 1952, has not as yet been officially reported (R. 9).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered November 3, 1952 (R. 11). The jurisdiction of this Court is invoked under Section 1254, subdivision 1, of Title 28, United States Code.

Question Presented

Where the subject of a gift is jewelry purchased at retail from a jeweler in an arm's-length transaction just prior to the date of the gift, is the value of the gift for Federal gift tax purposes

(1) the retail price paid, or

(2) the retail price plus the amount of the Federal excise tax?

Statutes and Regulations Involved

Internal Revenue Code:

Section 1000. IMPOSITION OF TAX

> "(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *"

Section 1005. GIFTS MADE IN PROPERTY

> "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

Regulations 108:

Section 86.19. VALUATION OF PROPERTY (a) GENERAL

> "The statute provides that if the gift is made in property the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined

> by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered."

Summary Statement

During the year 1947 the petitioner purchased from a retail jeweler certain items of jewelry which he shortly thereafter gave to his wife (R. 3a, 4a). Petitioner paid the retail sale price and the Federal excise tax of 20% of the sale price (R. 4a).

The issue presented is whether the value of the gift for Federal gift tax purposes is the sale price, or the sale price plus the amount of the excise tax.

The court below in a brief opinion (R. 7) affirmed the decison of the Tax Court which held, in a memorandum opinion, that the excise tax should be included in valuing the gift (R. 4a).

Reasons for Allowance of Writ

1. The decision of the court below results in the imposition of a tax upon a tax. It is thus in conflict with previous decisions of this Court in cases involving other types of double taxation.

In *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189 (1924), an income tax case, this Court said at page 196:

> "Such a duplication even in an exigent war tax measure is to be avoided unless required by express words."

And in *Maas* v. *Higgins*, 312 U. S. 443 (1941), this Court said at page 449:

> "Moreover, while the Constitution does not forbid double taxation, the intent to impose it upon a given receipt is not presumed. We think that if it had been intended, Congress unequivocally would have so declared."

2. The sole authority for the decision of the court below is a majority opinion of the Tax Court from which six of its fourteen Judges dissented in three separate opinions, and from which no appeal was taken. This was the opinion in *Estate of Frank M. Gould,* 14 T. C. 414 (1950), cited and quoted in a footnote to the decision below herein (R. 10).

Except for the *Gould* case, the issue here presented has never before been litigated. It is believed that the decision below and the majority opinion in the *Gould* case upon which it relies, are erroneous.

3. The question presented is of importance to taxpayers generally. The decision below sanctions the repellent practice of imposing a tax upon a tax. The importance of the issue is shown by the fact that the *Gould* case, where the issue was the same, was reviewed by the full Tax Court of fourteen judges, and three dissenting opinions were written.

Further, if the decision of the Court below is permitted to stand, its effect may be extended to the Federal estate tax field, since the gift tax and the estate tax are to be construed together. *Harris* v. *Commissioner,* 340 U. S. 106, 107 (1950).

CONCLUSION

It is respectfully submitted that for the reasons stated above the issue here presented should be reviewed by this Court.

Respectfully submitted,

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